STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHANTRIENES CASHELLO BARKER,

Defendant-Appellant.

UNPUBLISHED
December 28, 2001

No. 221303
Wayne Circuit Court
Criminal Division
LC No. 98-011600

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY DERNARD DAVIS,

Defendant-Appellant.

No. 221702
Wayne Circuit Court
Criminal Division
LC No. 98-011113

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ICHARD ODEN,

Defendant-Appellant.

No. 223068
Wayne Circuit Court
Criminal Division
LC No. 98-011113

Before: Holbrook, Jr., P.J., and Cavanagh and Gribbs*, JJ.

PER CURIAM.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

These consolidated cases arise from the torture and shooting death of Antoine Caruthers. Defendants Barker and Davis were tried together but before separate juries. Defendant Oden was tried separately. Barker appeals as of right from her jury trial convictions of first-degree felony murder, MCL 750.316, extortion, MCL 750.213, kidnapping, MCL 750.349, and conspiracy to commit extortion, MCL 750.157a(b). Davis appeals as of right from his convictions of first-degree felony murder, extortion, and conspiracy to commit extortion. Oden appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317, and kidnapping. Barker was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction, twelve to forty years' imprisonment for the extortion conviction, twenty to forty years' imprisonment for the kidnapping conviction, and twenty to forty years' imprisonment for the conspiracy conviction. Davis was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction, twelve to twenty years' imprisonment for the extortion conviction, and twenty-five to fifty years' imprisonment for the conspiracy conviction. Oden was sentenced to concurrent terms of twenty-five to forty five years' imprisonment for the second-degree murder conviction and fifteen to thirty years' imprisonment for the kidnapping conviction. We affirm each of Barker's and Davis' convictions and sentences, except for their extortion convictions, which we hereby vacate. We affirm Oden's convictions and sentences.

Docket No. 221303

Defendant Barker argues that insufficient evidence was presented to support her convictions for conspiracy to commit extortion and aiding and abetting the commission of extortion. We disagree. "When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt." *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999).

After reviewing the record in the appropriate light, we believe that the evidence adduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant agreed with her codefendants to extort money, and, therefore was guilty of conspiracy to commit extortion. *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001); *People v Justice (After Remand)*, 454 Mich 334, 347-348; 562 NW2d 652 (1997); *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). The victim was abducted from a music store shortly before midnight on September 15, 1998. Defendant acknowledged in her custodial statement that she was present in the house when Davis, Oden, and two other men brought the victim there. The victim was taken into the basement where he was tortured. Using the victim's cell phone, Davis called the victim's brother and demanded a $100,000 ransom. Another ransom call was also placed to the victim's girlfriend. During this time, Barker allowed the men to remain in her house even though she heard the victim screaming, smelled a burning odor coming from the basement,[1] and heard a gunshot. Indeed, the record shows that Barker went out and purchased food that she distributed to the men who were torturing the victim.

[1] The evidence established that the victim had been tortured with cigarettes and heated quarters.

In addition, LaBarbara Anderson, a jailhouse informant, testified that Barker told her that she and six men had kidnapped the victim from the record store. Anderson testified that Barker stated that the victim was kidnapped because he had run off with some drugs that belonged to Barker. According to Anderson, when the victim was brought back to the house, Barker "told them . . . that they had done fucked up" because "I told y'all to get his brother." According to Anderson, Barker indicated she wanted to kidnap the victim's brother because it was he who had money to pay a ransom. We believe this evidence was sufficient for a rational trier of fact to find that Barker had conspired to commit extortion.

We also conclude that this evidence was sufficient to prove that Barker aided and abetted the commission of extortion. *People v McCray*, 210 Mich App 9, 13; 533 NW2d 359 (1995)("One who procures, counsels, aids, or abets the commission of an offense may be prosecuted, convicted, and punished as if he directly committed the offense."); *People v Fobb*, 145 Mich App 786, 790; 378 NW2d 600 (1985). The evidence clearly established that Barker possessed the requisite intent. *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996).

We also reject Barker's assertion that there was insufficient evidence adduced at trial supporting her conviction for kidnapping as an aider and abettor. See *People v Jaffray*, 445 Mich 287, 296-297; 519 NW2d 108 (1994). Barker asserts that the evidence did not show that she shared the requisite intent of her associates. However, Barker admitted in her custodial statement that she was in the house when her associates brought the victim there and confined him in the basement. She remained in the house while the victim was forcibly detained and tortured. As previously discussed, there was also sufficient evidence to establish that Barker and her associates abducted the victim in an attempt to extort money from his family. We believe when viewed in a light most favorable to the prosecution, this evidence was sufficient to prove that Barker aided and abetted the kidnapping of the victim.

We also conclude that sufficient evidence was adduced to allow a jury to reasonably conclude that Barker possessed the intent necessary to support her felony-murder conviction. *People v Kelly*, 423 Mich 261; 378 NW2d 365 (1985); *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980). Anderson testified that defendant stated that when she was upstairs on the third floor of the house, she smelled something coming from the basement and went downstairs and saw the men "torturing [the victim] with hot quarters and cigarettes." According to Anderson, defendant pulled one of her brothers aside and told him "you know y'all can't kill him here." When her brother replied that, "I'm not going to kill him here, I'm in it for the money," defendant responded, "Well, y'all gone have to take him out of here and kill him". This evidence was sufficient to support defendant's felony-murder conviction, with extortion serving as the underlying felony.

Next, we reject Barker's argument that the trial court abused its discretion when it precluded defense counsel from cross-examining Anderson about her prison medical history. Under MRE 608(b), a witness may not be impeached by an inquiry into specific past acts unless the court finds that those acts reflect on the witness' character for truthfulness. *People v Brownridge*, 459 Mich 456, 463-465; 591 NW2d 26 (1999). Here, the trial court properly recognized that, while Anderson's prison medical reports were indicative of "certain character flaws," they were not indicative of her truthfulness or untruthfulness. Further, we note that the court allowed inquiry into the witness' prior convictions, use of aliases, prison disciplinary records, and parole status for purposes of challenging her credibility. Thus, contrary to

defendant's claim, she was not prevented from effectively cross-examining the witness with regard to credibility.

Finally, we agree with Barker's assertion that her conviction and sentence for extortion must be vacated because it violates her double jeopardy protections. US Const, Amend V. In *People v Warren*, 228 Mich App 336, 354-355; 578 NW2d 692 (1998), modified 462 Mich 415 (2000), this Court noted that convictions of both felony murder and the underlying felony offend double jeopardy protections and that, "[w]hen a defendant is erroneously convicted of both felony murder and the underlying felony, the proper remedy is to vacate the conviction and sentence for the underlying felony." Accordingly, we vacate defendant's conviction and sentence for extortion.

Docket No. 221702

Defendant Davis raises three challenges to the trial court's instruction of the jury. First, he argues that he is entitled to a new trial because the trial court erroneously instructed the jury on kidnapping, a crime for which he was not charged.[2] Because Davis did not object to the trial court's instructions at trial, we review the alleged error under the plain error rule. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice . . . ." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id.* at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

The record shows that the trial court did erroneously instruct the Davis jury on the charge of kidnapping. However, after the jury retired to deliberate, the court called it back and told the jurors that they should disregard the kidnapping instructions because defendant was not charged with that crime. Under these circumstances, we conclude that Davis has not established that he suffered prejudice requiring reversal.

Second, Davis argues that the trial court erred when it left out the concept of "moral certainty" from its reasonable doubt instruction. We disagree. The court's reasonable doubt instruction was consistent with CJI2d 3.2. "A trial court commits no error in giving CJI2d 3.2, which does not contain language expressly requiring proof of guilt to a moral certainty." *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000).

Third, Davis argues that the trial court erred in rejecting his request for an instruction on accessory after the fact. Again, we disagree. Relying on the dissent in *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999), Davis asserts that the crime of accessory after the fact is a cognate included offense of felony murder. However, as Davis acknowledges, the *Perry* majority

[2] Only Barker was charged with kidnapping.

specifically rejected this idea, because the crime of accessory after the fact is not in the same class or category as murder. *Id.* at 62-63.[3]

Next, Davis claims that he was denied a fair trial as a result of several statements made by the prosecutor during the course of trial. Because Davis did not raise a timely objection at trial, we review the alleged misconduct under the plain error rule. *Carines*, *supra* at 763.

First, Davis asserts that the prosecutor's opening statement was inflammatory. Specifically, Davis asserts that the prosecutor engaged in misconduct when he repeatedly remarked in his opening statement that the victim was screaming for justice. Looking at the statements in context, we believe that they were not a blatant appeal to sympathy and were not so inflammatory that defendant was prejudiced. *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994). It is clear from the context that the prosecutor's remarks were a part of a rhetorical theme used to persuade the jury of the power of the evidence culled from the postmortem examination of Caruthers. In any event, any possible prejudice could have been cured by an instruction upon timely objection. *People v Stanaway*, 446 Mich 643, 687, 521 NW2d 557 (1994); *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

Second, Davis asserts that the prosecutor committed misconduct when he remarked in both his opening and closing statements that the only question they had to decide was whether Davis had played a "role" in the victim's kidnapping, torture, extortion and murder, and, if so, what criminal responsibility he bore. We disagree. In context, the prosecutor's remarks were commentary on his belief that the evidence would establish the corpus delecti of the crimes, and that the only issue to be resolved would be criminal responsibility. We find nothing improper in this line of argument.

Third, Davis claims that he was denied a fair trial because the prosecutor injected issues broader than his guilt or innocence by suggesting that the jury would allow evil to triumph if it did not convict defendant. We disagree. Specifically, Davis asserts the prosecutor erred in paraphrasing an observation attributed to 18th century British politician Edmund Burke: "he said all that it takes for triumph of good over evil is for good men and women to do nothing." Although the prosecutor's reference to the Burke quotation "was clearly an improper civic duty argument," *People v Williams*, 179 Mich App 15, 18; 445 NW2d 170 (1989), we conclude that Davis has failed to show that he was prejudiced by the remark. *Carines*, *supra* at 764-765. Further, we do not believe this "forfeited error resulted in the conviction of an actually innocent defendant" or that it '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id.* at 763.

In light of the foregoing, we reject Davis' argument that he is entitled to a new trial on the basis of cumulative error. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). We also reject Davis' argument that his mandatory life sentence is unconstitutional.

[3] Davis also asserts that the trial court's failure to instruct on accessory after the fact violated "his due-process right to a fair trial under the Michigan Constitution, Const 1963, art 1, § 17." However, he neither develops this argument beyond this mere conclusory assertion, nor does he cite to any authority for this claim. Thus, the issue is not properly before us. *People v Battle*, 161 Mich App 99, 101; 409 NW2d 739 (1987).

People v Hall, 396 Mich 650, 657-658; 242 NW2d 377 (1976); *People v Snider*, 239 Mich App 393, 426-428; 608 NW2d 502 (2000).

Finally, as with Barker, we agree with Davis that his conviction and sentence for extortion must be vacated because it violates the protections against double jeopardy. US Const, Amend V; *Warren*, *supra* at 354-355.

Docket No. 223068

Defendant Oden argues that the trial court erred by denying his motion for a mistrial after the prosecutor made improper comments about his failure to testify. We disagree. We review the trial court's decision for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999).

Examined in context, we do not believe the prosecutor's comments were intentionally calculated to prejudice defendant. During defense counsel's closing argument, the following comments were made about Oden's custodial statement:

> Now, how do you know as jurors that Mr. Oden didn't lay out everything in there that clearly shows he had nothing to do with this. Maybe there's something that was said that could help you in deciding that he clearly is innocent of these charges. What gives [the officer who took the statement] the right to play god and decide what goes in, what goes out. If it's something that's incriminating, it goes in. If it's something that is not incriminating, oh, it stays out.

The prosecutor responded during rebuttal closing:

> Now, I don't want you to hold against the defendant the fact that he didn't testify. He had every right not to testify, and you shouldn't use it against him. The judge will tell you that.
>
> ***
>
> How do we know that [defense counsel's] argument about what really happened really boils down to him wanting you to believe him about what happened in that interrogation room. He says to you during closing argument . . . about [the police officer] . . . versus this young man. He says believe him. That's what he said. Believe him. Well, how can you believe him when you never heard from him.

The court immediately interrupted:

> Hold on a minute. Hold on a minute. Please. You know that's not correct . . . . You cannot say anything about the fact that he did not testify in this case.
>
> Members of the Jury, please understand that, okay. That is totally incorrect. Okay. Let's move on. Please ignore that. Don't pay any attention to that. . . .

Notwithstanding the court's admonition, the prosecutor returned to the subject:

> As I indicated earlier, I am not asking you to hold anything against him for not testifying. I want you to see that as the strategy that was employed.
>
> *Trial Court*: [Counsel] . . . , I just told you don't say anything about that in any kind of way.

It seems clear to us from the context that the prosecutor was trying to address the assertions made by defense counsel that the officer taking down Oden's custodial statement did not include exculpatory statements. We understand the difficulty in trying to address the argument that one person in a two-person conversation had not been entirely candid about the conversation, when the person making that charge, who happens to be the other person involved, has not given any direct testimony about the matter. Nonetheless, a criminal defendant's Fifth Amendment right not to testify should not be infringed because it is the clearest path to respond to a defense counsel's argument. In fact, the prosecutor did later address the issue without crossing this line.

Nonetheless, we believe the trial court's immediate cautioning of the prosecutor and instruction to the jury obviated any potential prejudice. Under the circumstances, the prosecutor's comments did not involve an irregularity that was so prejudicial as to deny defendant a fair trial. Thus, we conclude the trial court did not abuse its discretion in denying Oden's motion for a mistrial. *Id*. at 513-514.

Oden also claims that the prosecutor improperly vouched for the credibility of a prosecution witness. We disagree. A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Viewed in context, the prosecutor was not suggesting that he had some special knowledge that the witness testified truthfully. Rather, the prosecutor was responding to defense counsel's attack on the witness's veracity during closing argument. In this context, we do not find the prosecutor's remarks to be improper.

Finally, we reject Oden's assertion that his sentences violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). Oden's sentences are within the applicable sentencing guidelines, and are thus presumptively proportionate. *People v St. John*, 230 Mich App 644, 650; 585 NW2d 849 (1998). Oden has shown no special circumstances that would overcome this presumption. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997).

We affirm Barker's convictions and sentences for first-degree felony murder, kidnapping, and conspiracy to commit extortion, but vacate her conviction and sentence for extortion. We vacate Davis' conviction and sentence for extortion, but affirm his remaining convictions and sentences in all other respects. Oden's convictions and sentences are affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Roman S. Gribbs